BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILLY J. YATES	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,032,723
	)	
SEDGWICK COUNTY	)	
Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the August 9, 2007, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Roger A. Riedmiller, of Wichita, Kansas, appeared for claimant. Robert G. Martin, of Wichita, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) ordered that Dr. Robert Cusick will be claimant's authorized treating physician, and also ordered respondent to pay all medical treatment expenses.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 9, 2007, Preliminary Hearing and the exhibits, the transcript of the April 3, 2007, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends that claimant failed to meet his burden of proving that he suffered a compensable injury arising out of and in the course of his employment. Respondent asserts that it offered claimant a choice of three physicians, and claimant chose Dr. John Estivo to be his authorized treating physician. After meeting with claimant, Dr. Estivo concluded that claimant's symptoms were not the result of his work activities with respondent. Because of this evidence, respondent requests that the Board deny claimant's request for medical treatment.

Claimant argues that the only credible medical opinion in this case is that of Dr. George Fluter, who found there was a causal/contributory relationship between claimant's current condition and his work-related activities. Claimant requests the Board affirm the ALJ's Order.

However, the ALJ determined that the preliminary hearing issue was limited to whether claimant is entitled to a change of physician. He said the question of whether claimant suffered an injury by accident arising out of and in the course of his employment with respondent was not before the court. Accordingly, the issues for the Board's review are: Does the Board have jurisdiction to review the ALJ's Order on an appeal from a preliminary hearing and, if so, is claimant entitled to a change of physician?

FINDINGS OF FACT

This matter has recently been before the Board on an appeal from the ALJ's preliminary hearing Order of April 3, 2007. In an Order[1] dated May 30, 2007, this Board Member found that based on the evidence in the file at that time, claimant had met his burden of proving that he suffered an accident that arose out of and in the course of his employment with respondent. The ALJ's Order requiring respondent to furnish claimant with the names of three physicians for selection of one as an authorized treating physician was affirmed. In the interest of brevity, the findings of fact and principles of law set forth in the previous Order will not be repeated in this Order, but instead simply adopted and incorporated by reference.

Respondent then provided claimant with the names of three physicians, Dr. Prohaska, Dr. Estivo, and Dr. Wilkinson. Claimant chose Dr. Prohaska as his treating physician, but Dr. Prohaska refused to provide the treatment. Respondent replaced Dr. Prohaska with Dr. Shields. However, Dr. Shields also refused to treat claimant. This left Drs. Hughes, Estivo and Wilkinson. As neither Dr. Hughes nor Dr. Wilkinson were orthopedic surgeons, claimant chose Dr. Estivo as his treating physician.

Dr. Estivo examined claimant on June 18, 2007, and found that claimant had advanced degenerative joint disease to both his right and left knees and was in need of surgery. However, Dr. Estivo does not believe claimant's knee conditions are related to his work. Dr. Estivo's medical note of June 18 states:

> I have seen advanced arthritis such as in this situation in patients that work behind a desk primarily and do not ambulate or stand for long periods. I do not feel comfortable treating this patient's arthritis under workers' compensation. I do think the patient does need right and left knee replacements, but it is my opinion that this

[1] *Yates v. Sedgwick County*, Docket No. 1,032,723, 2007 WL 20043616 (Kan. WCAB May 30, 2007).

> should be treated outside of workers' compensation. He would have developed the advanced arthritis in his knees whether he worked in his present job or not.[2]

At the August 9 preliminary hearing, claimant's attorney argued that respondent failed to provide a list of three qualified physicians, as Drs. Hughes and Wilkinson were not orthopedic surgeons. Claimant's attorney argued that Dr. Estivo refused to treat claimant, and, therefore, claimant should be able to chose his treating physician. Claimant's attorney suggested that Dr. Robert Cusick, an orthopedic surgeon, be named as claimant's treating physician. Respondent attempted to argue that given the new opinion evidence from Dr. Estivo, the ALJ should find the claim not compensable. However, the ALJ said that the compensability issue was not before him:

> [RESPONDENT'S ATTORNEY]: . . . So our feeling is with this additional input for the first time from an orthopedic surgeon and for the first time from a Court-authorized physician from the list of three the Court has every right to re-evaluate to the extent the Court, in your discretion, wishes to decide whether this is compensable or not. As to Dr. Cusick, I don't have a problem–we don't have a problem with Dr. Cusick if you decide to continue to say it is compensable. And that's our position.
>
> THE COURT: Well, this is preliminary hearing purposes. This is another case where a doctor wants to be the judge. Dr. Eyster used to do that. These physicians don't understand the Kansas law on workers' compensation apparently when it comes to the aggravation of a preexisting condition. The compensability issue was decided quite some time ago. And that's not an issue this morning. The order for three physicians was complied with, the gentleman was seen by Dr. Estivo, he recommends knee surgery, he just doesn't want to do it. So let's find somebody else to do it. And then, of course, you can argue at the final award that this is not a compensable claim. But that's not–that issue has already been determined at preliminary hearing.[3]

PRINCIPLES OF LAW

K.S.A. 2006 Supp. 44-510h(b)(1) states:

> If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible

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[2] P.H. Trans. (Aug. 9, 2007), Resp. Ex. 1 at 2.

[3] P.H. Trans. (Aug. 9, 2007) at 9-10.

> given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

The Board's jurisdiction to review a preliminary hearing order is limited. K.S.A. 2006 Supp. 44-551(i)(2)(A) states in part:

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 44-534a(a)(2) states in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

In *Allen*,[4] the Kansas Court of Appeals stated:

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.

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[4] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-04, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.[5]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[7]

ANALYSIS AND CONCLUSION

At the time of this Board Member's previous Order, the only expert medical opinion concerning causation was that of Dr. George Fluter. Now the record includes the opinion of Dr. Estivo as well. It is not the province of a physician to decide what is a compensable injury under the Kansas Workers Compensation Act. However, expert medical opinions are generally considered to be persuasive evidence of whether a claimant's injury was caused or aggravated by the claimant's work activities (accidents). Dr. Estivo places no greater significance on claimant's work activities with respondent as a causative factor of claimant's knee conditions than the natural aging process and normal activities of day-to-day living. Conversely, Dr. Fluter believes claimant's work activities aggravated claimant's condition and accelerated his need for surgery beyond what would have occurred absent that work.

The ALJ ordered respondent to continue providing medical treatment to claimant. The ALJ did not do so because he remained persuaded by Dr. Fluter's opinion and did not see a need for an IME by a neutral physician under K.S.A. 44-516. Rather, he did so because he ruled that the only issue before him was whether claimant was in need of a change of physician in order to obtain necessary medical treatment. He stated that the questions of causation and compensability were not before him. He did not consider or rule on those issues in his Order and, therefore, the Board is without jurisdiction to consider those issues on appeal.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the respondent's appeal from the Order of Administrative Law Judge John D. Clark dated August 9, 2007, must be and is hereby dismissed.

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[5] See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

[6] K.S.A. 44-534a.

[7] K.S.A. 2006 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this _____ day of October, 2007.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Robert G. Martin, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge